Supreme Court, U.S.
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No. ———

In The
Supreme Court of the United States

JOSE A. RIVAS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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September 1, 2009

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QUESTIONS PRESENTED

Whether, under the Confrontation and Due Process Clauses, a defendant has a Constitutional right to examine the prosecution's physical trial evidence against him so that he may challenge its authenticity and reliability?

And, if so, whether a state procedural rule that conditions a defendant's ability to examine the prosecution's trial evidence upon the defendant's showing that the prosecution "has provided false, incomplete, adulterated, or spoliated evidence" improperly shifts the prosecution's evidentiary burden onto a defendant in violation of the Due Process Clause?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION 2

STATEMENT 4

REASONS FOR GRANTING THE WRIT 7

I. The Court has never squarely addressed whether a defendant has a Constitutional right to examine the prosecution's physical trial evidence against him. 8

II. Ohio's procedural rule requiring a defendant to make a prima facie showing that physical evidence has been falsified or spoliated as a precondition to examining that evidence is plainly inconsistent with Due Process and Confrontation.. 10

III. Without this Court's immediate intervention, Ohio's procedural rule will preclude a defendant from being able to discover potential defects in

the prosecution's physical trial evidence against him. 13

CONCLUSION 15

APPENDIX

Appendix A: Ohio Supreme Court's Opinion in *State v. Rivas*, dated March 31, 2009 . . . . . 1a

Appendix B: Ohio Supreme Court's Order denying reconsideration, dated June 3, 2009 . 17a

Appendix C: Court of Appeals Opinion from 2nd District in *State v. Rivas*, dated July 13, 2007 . . . . . 18a

Appendix D: Defendant's Supplemental Motion for Discovery, dated February 25, 2005 . . . . 27a

Appendix E: Judgment Entry, dated March 10, 2005 . . . . . 30a

Appendix F: Judgment Entry, dated July 12, 2005 . . . . . 32a

Appendix G: Judgment Entry, dated August 15, 2005 . . . . . 34a

Appendix H: Ohio Crim.R. 16 . . . . . 38a

TABLE OF AUTHORITIES

CASES

Arizona v. Youngblood,
488 U.S. 51 (1988) 9

Brady v. Maryland,
373 U.S. 83 (1963) 9, 11

California v. Trombetta,
467 U.S. 479 (1984) 3, 8, 10

Crane v. Kentucky,
476 U.S. 683 (1986) 8

Crawford v. Washington,
541 U.S. 36 (2004) 3, 12

Holmes v. South Carolina,
547 U.S. 319 (2006) 3, 8

In Re Winship,
397 U.S. 358 (1970) 10

Melendez-Diaz v. Massachusetts,
--U.S.--, 129 S.Ct. 2527 (2009) 3, 12

Rock v. Arkansas,
483 U.S. 44 (1987) 8

U.S. v. Agurs,
427 U.S. 97 (1976) 11

U.S. v. Scheffer,
523 U.S. 303 (1998) 8

CONSTITUTION

U.S. Const. Amend VI 1

U.S. Const. Amend XIV, § 1 2

STATUTES

28 U.S.C. §1257(a) 1

RULES

Fed.R.Crim.P. 16 8

Ohio R. Crim. P. 16(B)(1)(c) . . . . . *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Rivas respectfully petitions for a writ of certiorari *to the Supreme Court of Ohio* in *State v. Rivas,* 121 Ohio St.3d 469, 905 N.E.2d 618 (Ohio 2009).

OPINION BELOW

The opinion of the Supreme Court of Ohio issued March 31, 2009 (Apx.1a) is published at 121 Ohio St.3d 469, 905 N.E.2d 618. The order of the Supreme Court of Ohio (entered June 3, 2009) denying reconsideration (Apx.17a) is unpublished and unreported. The opinion of the Ohio Court of Appeals for the Second District, issued July 13, 2009, is published at 172 Ohio App.3d 473, 875 N.E.2d 665. (Apx.18a). The relevant decisions of the Greene County Common Pleas Court (Apx.30a-37a) are unpublished and unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio initially decided this case on March 31, 2009, and denied Petitioner's timely motion for reconsideration on June 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part that: "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment, Section 1, to the United States Constitution provides in relevant part that: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Ohio Rule of Criminal Procedure 16(B)(1)(c), provides in relevant part that: "[u]pon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant." Ohio Crim.R. 16 is reproduced in its entirety at Apx.38a, with (B)(1)(c) located at Apx.39a.

INTRODUCTION

This case presents the issue of whether a criminal defendant can be denied the opportunity to inspect a computer hard drive in the possession of the prosecution in order to determine the authenticity and reliability of a computer generated printout of a purported online communication between a defendant and an undercover police officer posing as a minor. The printout was the centerpiece of the prosecution's case.

This issue is especially timely in light of the fact that law enforcement agencies are increasingly reliant upon technology, including electronic data, to investigate and prosecute criminal defendants. Despite the growing primacy of physical evidence in criminal trials, this Court has never squarely addressed whether a criminal defendant has a Constitutional right to examine the prosecution's physical trial evidence against him so he may verify – or refute – its authenticity, accuracy and reliability. Until now, the issue has been dormant because procedural rules in nearly every state and federal court provide that a defendant is entitled to pretrial discovery of physical evidence that the prosecution intends to use at trial. That is no longer the case in Ohio.

As a result of the opinion below, Ohio Crim.R.16 now prohibits a defendant in that state from examining the original source of the prosecution's physical trial evidence unless the defendant can make a prima facie showing – without the benefit of pretrial discovery – that the prosecution "has provided false, incomplete, adulterated, or spoliated evidence." In the estimation of the Supreme Court of Ohio, "ordering the state to verify its discovery...sends the wrong message to the legal community." (Apx.11a).

Ohio's procedural rule is irreconcilable with this Court's mandate that states provide a defendant with "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); citing *California v. Trombetta*, 467 U.S. 479, 485 (1984). It is further incompatible with this Court's holdings in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, --U.S.--,

129 S.Ct. 2527 (2009), requiring that a defendant be permitted to challenge the prosecution's evidence against him through cross-examination. These established rights to Due Process and Confrontation are illusory if a defendant is denied the opportunity to challenge the authenticity, reliability and accuracy of physical evidence that the state intends to use against him at trial.

STATEMENT

1. Petitioner was charged with soliciting sex from a minor following his online conversation with a police detective who allegedly was posing as a minor.

The central evidence of the alleged offense was an online communication between Petitioner and the detective. The prosecution offered the detective's testimony, which it supported by a transcript of the online communication that the detective testified he had printed from a police computer. On the printout, the detective identified himself as 14 years old. Petitioner disputed the accuracy of the printout, asserting that the detective had, in fact, identified himself as 41 years old during their online communication. Notably, the detective was 41 years old at the time and he had arranged to meet the Petitioner at a hotel bar.

2. Pursuant to Ohio Rule of Criminal Procedure 16(B)(1)(c), Petitioner sought to examine the electronic data from which the detective allegedly generated the transcript. (Apx.D). The trial court initially granted Petitioner's request and ordered the prosecution to make the electronic data available for inspection by

Petitioner's retained computer expert under police supervision. (Apx.E).

The police refused, citing non-specific "security concerns." Police provided Petitioner's expert only with a paper printout of the conversation and a compact disc containing a scanned copy of the same. Neither format contained the original electronic data from which the printout was derived.

3. Petitioner moved to compel examination of the electronic evidence.

At a hearing, Petitioner's retained computer expert testified that examining the hard drive from which the printout was generated was the only way to determine whether the printout was an authentic and accurate representation of the online communications between Petitioner and the detective. He further testified as to how a printout could potentially be altered without such alterations being apparent from the face of a printout.

Notwithstanding, the trial court reversed its previous discovery order and prohibited Petitioner from examining the electronic data unless he could provide "some evidence that what has been provided [printouts] is not accurate." (Apx.33a).

4. At trial, the prosecution offered the printout into evidence over defense objection. In addition, the police detective testified at length regarding the content of the printout. The jury convicted Petitioner on both felony counts.

5. On direct appeal, the Ohio Court of Appeals for the Second District unanimously reversed the trial court, holding that "[f]orcing a litigant to rely upon an adverse party's representation that a transcript from a hard drive accurately reflects the information stored on the hard drive, when that accuracy could be directly verified, is inconsistent with due process." (Apx.19a). Instead, the appellate court held that "[w]here there is direct evidence of a conversation allegedly constituting the crime with which the defendant is charged, we hold that the right to a fair trial includes the right of the defendant to some reasonable means of verifying that a purported transcript of a conversation, prepared from the direct evidence by the adverse party, is accurate and complete." * * * (Apx.25a).

6. The Supreme Court of Ohio, in a 4-3 decision, reversed the appellate court, finding that "ordering the state to verify its discovery...sends the wrong message to the legal community and does not represent the law of this state." (Apx.11a).

According to the Supreme Court of Ohio, under Ohio Crim.R. 16, "when a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence." (Id.).

REASONS FOR GRANTING THE WRIT

Petitioner respectfully requests the Court grant certiorari for three reasons:

First, this Court has never squarely addressed the fundamental question of whether a defendant has a Constitutional right to examine the prosecution's trial evidence against him. This makes clear that the need for this Court's guidance is now.

Second, Ohio's procedural rule requiring a defendant to show a defect in the prosecution's trial evidence as a precondition to examining it is plainly inconsistent with this Court's decisions regarding Due Process and Confrontation. Indeed, these Constitutional rights are illusory if a defendant is denied the ability to confirm or refute whether physical evidence against him is what the prosecution purports it to be.

Third, this decision threatens an immediate, profound and unconstitutional impact on all criminal cases involving physical evidence in Ohio. If left to stand, the rule in Ohio will be that the prosecution's physical trial evidence is presumed authentic and reliable unless a defendant can meet the nearly impossible burden of showing – without the benefit of independent examination – that it is not.

I. The Court has never squarely addressed whether a defendant has a Constitutional right to examine the prosecution's physical trial evidence against him.

Until now it has not been necessary for this Court to explicitly address whether a defendant has a Constitutional right to examine the prosecution's physical trial evidence against him. The procedural rules in nearly every state as well as the federal courts entitle a defendant to pretrial discovery of physical evidence that the prosecution intends to use at trial. See e.g. Fed.R.Crim.P. 16. This is no longer the case in Ohio.

While this Court has traditionally deferred to the states to prescribe procedural and evidentiary rules for criminal proceedings, the Court has made clear that "[t]his latitude, however, has limits." *Holmes,* 547 U.S. at 324. "Whether rooted in the Due Process Clause or the Confrontation Clause, the Constitution guarantees a criminal defendant 'a meaningful opportunity to present a complete defense.'" *Id.*; *Crane v. Kentucky,* 476 U.S. 683, 690 (1986); quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984). Where, as here, state rules "infring[e] upon the weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purpose they are designed to serve,'" this Court has not hesitated to intervene. *Holmes,* 547 U.S. at 324; quoting *U.S. v. Scheffer,* 523 U.S. 303, 308 (1998) and *Rock v. Arkansas,* 483 U.S. 44, 58 (1987).

The Supreme Court of Ohio's pronouncement that Crim.R.16(B)(1)(c) requires a defendant to prove, as a condition to examining the prosecution's trial evidence against him, that the prosecution "has provided false,

incomplete, adulterated, or spoliated evidence" is precisely the sort of arbitrary and disproportionate rule that "infringes upon the weighty interest of the accused" – and warrants this Court's intervention. As the three dissenting state court justices explained:

> There is no justification for creating, as the majority opinion does, a permanent judicial gloss over the plain language of the discovery rules to short-circuit [Petitioner's] discovery request. Moreover, imposing such a standard ignores the plain language of [Crim.R.16(B)(1)(c)] by imposing obligations on the defendant beyond the rule's 'materiality' standard. * * * [F]orcing a litigant to rely upon an adverse party's representation that a transcript is accurate without allowing any verification of that accuracy is inconsistent with general notions of a fair trial." (Apx.13a-14a, citing *State v. Rivas,* 172 Ohio App.3d 473, 875 N.E.2d 655 (2007), Apx.19a).

While this case involves the denial of pretrial discovery, it is not resolved by either this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963) governing the suppression of material, exculpatory evidence or *Arizona v. Youngblood,* 488 U.S. 51 (1988) governing the loss or destruction of exculpatory evidence. Both of those decisions addressed evidence that a jury never saw – evidence that did not factor into the jury's verdict. This case, however, involves an entirely distinct issue involving evidence that the prosecution actually uses against a defendant at trial. This Court has never directly addressed whether, under the Due Process and Confrontation Clauses, a criminal defendant has the right to challenge the

authenticity, reliability and accuracy of the prosecution's physical evidence used against him at trial.

II. Ohio's procedural rule requiring a defendant to make a prima facie showing that physical evidence has been falsified or spoliated as a precondition to examining that evidence is plainly inconsistent with Due Process and Confrontation.

While the Court has not directly addressed this issue, the opinion below – and the new state procedural rule it encompasses – is clearly incompatible with this Court's precedent in two regards:

First, to the extent Ohio now procedurally burdens a defendant with proving that the prosecution "has provided false, incomplete, adulterated, or spoliated evidence" (Apx.11a) as a precondition to pretrial discovery, it is inconsistent with two of this Court's seminal Due Process decisions. The first is *In Re Winship,* confirming that the prosecution must always bear the burden of proving every element of its case beyond a reasonable doubt. *Winship,* 397 U.S. 358, 364 (1970). The second is *Trombetta,* requiring a state to provide a defendant with "a meaningful opportunity to present a complete defense." 467 U.S. at 485. Ohio's new rule of criminal procedure flouts both of these precedents. Remarkably, in Ohio, in order for a defendant to verify whether the prosecution's trial evidence against him is authentic and reliable, he must first present evidence that it is not. *Id.*

The Supreme Court of Ohio's reliance on this Court's decision in *U.S. v. Agurs*, 427 U.S. 97 (1976) is grossly misplaced and warrants this Court's correction. (Apx.9a). In *Agurs*, a defendant convicted of murder argued that the prosecution's failure to disclose the victim's criminal record violated Due Process. 427 U.S. at 99-100. This Court rejected that argument largely because the defendant never requested the record during pretrial discovery. Moreover, she offered no explanation as to how it could have affected the outcome, holding that "[t]he mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109-110 (emphasis added).

In focusing on this singular statement in *Agurs*, the majority apparently ignored the rest of this Court's decision. The Court expressly stated that the "materiality" of items requested during discovery is different than those that are not. *Id.* at 106 ("test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made"). Indeed, the *Agurs* Court expressly warned that "[w]hen the prosecutor receives a specific and relevant [discovery] request," his failure to respond to such "is seldom, if ever, excusable." *Id.*

The Supreme Court of Ohio's comparison of Petitioner's discovery request to a "fishing expedition" reflects that court's disdain for a defendant's right to conduct meaningful pretrial discovery. Petitioner's request was not only specific and relevant, it precisely stated that he needed the electronic evidence because he disputed the accuracy of the information contained

on the computer generated printout that the prosecution intended to use against him at trial. The Supreme Court of Ohio held that this was insufficient to establish "materiality" for the purposes of pretrial discovery. (Apx.9a). Instead, the court held that a defendant must make a prima facie showing not simply that the evidence is necessary to his defense, but also that it is "false, incomplete, adulterated, or spoliated evidence." (Apx.11a).

The sophistry in this reasoning is apparent. In order to discover whether a defect exists in the prosecution's trial evidence, a defendant must first be able to prove the existence of the defect. This holding – and the new procedural rule it establishes – plainly deprive a defendant of any reasonable means of ensuring that the prosecution has proven its case beyond a reasonable doubt or of presenting a complete defense.

Second, the Supreme Court of Ohio's holding renders a defendant's right to Confrontation – recently confirmed by this Court in *Crawford* and *Melendez-Diaz* – virtually meaningless. The Court has described the Confrontation Clause as a procedural guarantee that the reliability of the state's evidence "be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Indeed, as the appellate court in this decision below aptly recognized:

> [i]ncreasingly, the testimony of witnesses may actually be less important to the outcome of a criminal trial than [physical] evidence. Examples of this trend include DNA evidence in a criminal case and blood-alcohol tests in

prosecutions for driving with a prohibited concentration of alcohol in the blood. (Apx.24a).

Those examples represent a category of physical evidence that is not merely probative of an element of the prosecution's case, but, if authentic and reliable, is dispositive of it. A defendant's right to cross-examine witness testimony regarding this often outcome-influencing evidence has little value if the defendant is prevented from scrutinizing the evidence in the absence of a smoking gun that shows the evidence is defective. A defendant's best and often only opportunity to determine whether the prosecution's trial evidence against him is what the prosecution purports it to be is through pretrial discovery.

III. Without this Court's immediate intervention, Ohio's procedural rule will preclude a defendant from being able to discover potential defects in the prosecution's physical trial evidence against him.

This case clearly demonstrates how Ohio's new procedural discovery rule is a crippling catch-22 for a defendant:

The police detective testified that during his online communications with Petitioner he told Petitioner that he was 14 years of age. Petitioner, however, testified that the police officer told him he was 41 – an assertion that Petitioner volunteered to police officers immediately upon being detained but before he was even arrested. The electronic data of the online communications between the detective and the Petitioner represented a direct and certain way to

determine which witness was telling the truth. And yet Petitioner was denied the opportunity to examine the computer's hard drive to directly challenge the accuracy of the printout as well as the testimony of the detective.

To the extent the printout used to convict Petitioner may have been defective – either as result of intentional or unintentional actions by the police or prosecution – such defects could not be ascertained, much less established, by the defense with any level of credibility, without examining the hard drive from which the printout was purportedly derived. Thus, while Petitioner may have had the right to cross-examine the police detective, he was denied any meaningful way of doing so with regard to the printout.

Computers do not lie. But people – even police officers and prosecutors – can. There was one sure way to know who was telling the truth in this case: the electronic data. Yet the Supreme Court of Ohio now accords a judicially sanctioned deference to the credibility of physical evidence and testimony offered by the prosecution and law enforcement. Such deference is wholly inconsistent with principles underlying a defendant's right to Due Process and Confrontation.

CONCLUSION

For these reasons, Petitioner respectfully requests the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Cite as *State v. Rivas*, 121 Ohio St.3d 469, 2009-Ohio-1354.]

THE SUPREME COURT OF OHIO

No. 2007-1611

Submitted September 16, 2008
Decided March 31, 2009

THE STATE OF OHIO,
APPELLANT,

v.

RIVAS,
APPELLEE.

Criminal law — Discovery — Crim.R. 16(B)(1)(c) — Evidence on police computers — When a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence — Judgment reversed.

APPEAL from the Court of Appeals for Greene County, No. 05-CA-147, 172 Ohio App.3d 473, 2007-Ohio-3593.

SYLLABUS OF THE COURT

Pursuant to a Crim.R. 16(B)(1)(c) discovery request, when a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence.

O'DONNELL, J.

{¶ 1} The Second District Court of Appeals reversed the judgment convicting Jose Rivas of importuning and attempted unlawful sexual conduct with a minor based on a trial court ruling denying him the opportunity to verify the accuracy of discovery provided by the state by allowing his expert to examine the state's computer hard drive. The state of Ohio has appealed that judgment to this court, and we agreed to address its proposition of law concerning the propriety of a trial court denying a motion to compel discovery of a confidential law enforcement investigatory record absent a showing of particularized need. We conclude that when, pursuant to a Crim.R. 16(B)(1)(c) discovery request, a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the

computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence. Because Rivas failed to meet that burden, the judgment of the court of appeals is reversed.

Facts and Procedural History

{¶ 2} On January 3, 2005, Detective Alonzo Wilson, a member of the Xenia Police Division's Internet Child-Protection Unit, logged onto an Internet chat service posing as a 14-year-old female named Molly. Jose Rivas, using the screen name JRivas123, contacted Molly, asking for her age, gender, and photograph. The two carried on an online conversation, and eventually Wilson e-mailed Rivas a teenage photo of a Xenia police detective. Rivas e-mailed Molly a picture of a male with an exposed, erect penis protruding through underwear and led her to believe it depicted him. He then propositioned her and offered her $200 to engage in sexual activity with him. Wilson contacted Rivas the next day, and Rivas again offered her $200 and arranged to meet her at the Holiday Inn in Xenia. Molly advised that she had a pager, and Rivas agreed to send her a page with his Holiday Inn room number.

{¶ 3} After printing a transcript of the online conversations, Wilson arranged to have a surveillance team watch the hotel. He waited in an office behind the front desk at the Holiday Inn as Rivas checked into a room, and he observed that the name Jose Rivas matched the suspect's screen name, JRivas123, in the online communications. The hotel assigned room 302 to Rivas, and soon thereafter, Wilson received an electronic page that contained the number 302. Wilson

arrested Rivas at the Holiday Inn, and subsequently, a grand jury indicted him for importuning and attempted unlawful sexual conduct with a minor.

{¶ 4} Prior to trial, Rivas moved to preserve the state's electronic evidence and sought a mirror image of the hard drive of the state's computer used by Wilson to communicate with him. The trial court ordered the state to allow Rivas to inspect the computer, but the prosecution refused to allow the defense to retrieve a mirror image of the hard drive, citing "security reasons." The prosecution provided a transcript of the conversations and a compact disc containing an electronic copy of the online communications.

{¶ 5} Rivas moved to suppress the computer-generated evidence and to compel the state to provide a mirror image of the computer hard drive. The trial court denied the motion to suppress and the motion to compel, concluding that Crim.R. 16(B)(1)(c) did not require the state to produce an exact copy of its computer hard drive "in the absence of allegations and some evidence that what has been provided is not accurate." In particular, the trial court found no evidence that the transcript of the Internet communications between Rivas and Wilson had been "altered or compromised in any way." It explained that any concerns identified by Rivas relating to altered or deleted data on the hard drive were relieved by the fact that rebooting and using the same computer for different cases would not have affected the accuracy or integrity of the transcript because Detective Wilson had printed the hard copy of the chats immediately following those sessions. The trial court further noted that Rivas had destroyed his own hard drive, which

would have allowed him to verify the accuracy of the discovery provided by the state.

{¶ 6} At trial, Rivas alleged that the transcript did not accurately reflect his Internet communications with Wilson. He asserted that he had communicated with a 41-year-old woman, not a 14-year-old girl, and denied receiving a photograph of a 14-year-old girl during the online exchanges. His contention is belied by the fact that there were several references in the transcript to doing homework, her supervision by her grandmother, the fact that she had to be home by a certain hour, and his assent that she would be able to comply with that time deadline. Rivas challenged the accuracy of some of the statements appearing in the transcript. The jury found Rivas guilty of importuning and attempted unlawful sexual conduct with a minor.

{¶ 7} The court of appeals reversed both convictions, holding that the trial court had violated Rivas's right to a fair trial when it refused Rivas the opportunity to verify the accuracy and completeness of the computer transcripts prepared by the state, stating that "a defendant should not be required to take the word of the adverse party * * * that a transcript of information stored on a hard drive is accurate * * *." *State v. Rivas*, 172 Ohio App.3d 473, 2007-Ohio-3593, 875 N.E.2d 655, at ¶ 15. The appellate court concluded that the trial court could have upheld the state's need to safeguard the confidentiality of information stored on the computer while protecting Rivas's right to a fair trial by conducting its own in camera inspection of the hard drive. Id. at ¶ 17. The cause is before the court upon our acceptance of the state's appeal. *State v. Rivas*, 116 Ohio St.3d 1455, 2007-Ohio-6803, 878 N.E.2d 33.

Proposition of Law

{¶ 8} On appeal to this court, the state contends that the trial court properly denied Rivas's motion to compel discovery because the hard drive contained confidential law enforcement investigatory records protected from disclosure under the Public Records Act in R.C. 149.43(A)(1)(h). According to the state, Rivas also failed to meet his burden to show that the discovery provided by the state was incomplete or otherwise inaccurate, and therefore Crim.R. 16(B) did not require an inspection of the computer's hard drive.

{¶ 9} Rivas maintains that R.C. 149.43(A)(1)(h) relates to public records requests and does not protect police records from discovery in the course of litigation. He urges that the plain language of Crim.R. 16(B)(1)(c) permits him to inspect and copy the hard drive, explaining that the rule requires discovery of tangible evidence that is material to the preparation of his defense. Further, Rivas asserts that the hard drive is material evidence because his expert's testimony established specific concerns regarding the accuracy of the transcripts that represented the communications between Wilson and Rivas.

{¶ 10} We are called upon to consider whether, in a case in which the prosecutor has complied with its duty to provide discovery by delivering a transcript of evidence from the hard drive of a police computer, the accused has a right to obtain a mirror image of the computer hard drive without making a prima facie showing that the information in the transcript is false, incomplete, adulterated, or spoliated.

Law and Analysis

{¶ 11} Crim.R. 16(B)(1)(c) governs the disclosure of documents and tangible evidence by a prosecuting attorney: "Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant." Thus, as relevant to this case, Crim.R. 16(B)(1)(c) permits the accused to inspect tangible evidence that is material to the preparation of his defense.

{¶ 12} The question of which party bears the burden of going forward with evidence when the accused seeks to verify the discovery provided by the state pursuant to Crim.R. 16(B)(1)(c) appears to be one of first impression in this court. However, in *Chillicothe v. Knight* (1992), 75 Ohio App.3d 544, 550, 599 N.E.2d 871, the court held that it is the accused who bears the initial burden of establishing a prima facie case of materiality before Crim.R. 16(B) requires the state to turn over tangible evidence.

{¶ 13} Further, Rule 16(a)(1)(E) of the current Federal Rules of Criminal Procedure, which is analogous to Crim.R. 16(B)(1)(c), requires that "the defendant show[ ] that disclosure of the document or tangible object is material to the defense" before it requires the government to produce tangible evidence in its possession. Fed.R.Crim.P. 16 Advisory

Committee Note on the 1974 Amendment. Federal courts interpreting Fed.R.Crim.P. 16(a)(1)(E) and its predecessor provision, Fed.R.Crim.P. 16(a)(1)(C), Advisory Committee Notes on the 2002 Amendments, have held that the accused bears the burden of making a prima facie showing of entitlement to the materials sought in discovery before the rule requires the government to produce them. " 'To obtain discovery under Rule 16, a defendant must make a prima facie showing of materiality.' " *United States v. Zone* (C.A.9, 2005), 403 F.3d 1101, 1107, quoting *United States v. Mandel* (C.A.9, 1990), 914 F.2d 1215, 1219; *United States v. Thompson* (C.A.7, 1991), 944 F.2d 1331, 1341 ("To successfully press a claim that the government violated [Fed.R.Crim.P. 16(a)(1)(C)], the defendant must make at least a *prima facie* showing that the requested items are material to his defense"); *United States v. Carrasquillo-Plaza* (C.A.1, 1989), 873 F.2d 10, 12 ("defendant did not make a request, together with 'a prima facie showing of materiality,' for the statements as required under [Fed.R.Crim.P 16(a)(1)(C)]"); *United States v. Buckley* (C.A.5, 1978), 586 F.2d 498, 506 ("Contrary to Buckley's assertion that Rule 16(a)(1)(C) 'mandate(s) the production of such documents upon request,' it is incumbent upon a defendant to make a Prima facie showing of 'materiality' in order to obtain discovery").

{¶ 14} Moreover, in other situations in which the accused asserts that the government withheld or destroyed evidence, this court has held that the accused bears the burden of establishing his case. The defendant bears the burden of showing that the state acted in bad faith in destroying potentially useful evidence, *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, at ¶ 14, and of showing

that the state withheld favorable and material evidence. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 338-339. Mere speculation does not meet the accused's burden to show that the withheld evidence is material. Id. at ¶ 339; *State v. Jackson* (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549, quoting *United States v. Agurs* (1976), 427 U.S. 97, 109-110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (" 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense' ").

{¶ 15} Similarly, to show spoliation of evidence, the "proponent must first establish that (1) the evidence is relevant, (2) the offending party's expert had an opportunity to examine the unaltered evidence, and (3) even though the offending party was put on notice of impending litigation, this evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the proponent." *Simeone v. Girard City Bd. of Edn.*, 171 Ohio App.3d 633, 2007-Ohio-1775, 872 N.E.2d 344, at ¶ 69. The burden of proof falls on the party alleging spoliation.

{¶ 16} Thus, pursuant to a Crim.R. 16(B)(1)(c) discovery request, when a prosecutor has provided a written transcript that purports to accurately reflect data stored on a computer hard drive, a court may not order an examination of the computer hard drive unless the defense makes a prima facie showing that the state has provided false, incomplete, adulterated, or spoliated evidence.

{¶ 17} Rivas presented no evidence that the state refused to produce material evidence or that it

provided him with false, incomplete, adulterated, or spoliated evidence. Although he makes much of the fact that Wilson continued to use the computer after his arrest and that rebooting a computer changes the data in thousands of files used to start up a computer system, Rivas failed to demonstrate that rebooting a computer would alter the content of the e-mails or files at issue here. Further, even his own expert agreed that "if the officer testified that he reviewed these chats, that they were obviously on his computer screen, he reviewed them immediately after and they do represent an accurate replication of those conversations," continuing to use and reboot the computer would not have affected the accuracy and integrity of the hard copy of the communications produced by the state in its discovery. Rather than specifically testifying that any evidence had in fact been altered, Rivas's expert explained that he could establish the falsification of the state's discovery – assuming any falsification had actually occurred – only by examining the hard drive of the state's computer. However, speculation and conjecture regarding the possibility of material evidence appearing on the hard drive do not demonstrate any inaccuracy in the discovery that the state provided so as to entitle Rivas to inspect the hard drive and verify the accuracy of the transcript. Cf. *United States v. Persico* (E.D.N.Y.2006), 447 F.Supp.2d 213, 217 ("Basing discovery requests on nothing more than mere conjecture renders any request for information outside the ambit of Rule 16 a non-starter"). *Persico* involved a similar factual situation, as the discovery sought included "electronic surveillance recordings and reports, physical surveillance reports and photographs, the names of certain confidential sources with related reports and law enforcement notes, and various telephone toll

records, pen register and pager information," and the defendants contended that only they could discern the existence of impeachment or exculpatory evidence within these materials. Id. at 217-218. Noting the government's representations that it had complied with its discovery obligations, the court explained that "the mere claim that the items sought are 'material' is not enough." Id.

{¶ 18} Ultimately, this is not a case about false or incomplete discovery or a case involving the denial of due process or the violation of Crim.R. 16(B). Here, the state has fully complied with and provided all the discovery required by Crim.R. 16(B). However, based on the speculation of an expert witness and Rivas's unsupported assertion that the transcript has been altered, the court of appeals concluded that Rivas had a right to verify the discovery provided by the state. The appellate court's decision makes the wrong presumption about discovery. The presumption should be that counsel comply with our rules of discovery. Presuming the state's lack of compliance with discovery based on an assertion by an opposing party, and ordering the state to verify its discovery on such an assertion, sends the wrong message to the legal community and does not represent the law of this state.

Conclusion

{¶ 19} In this case, after having received a written transcript purporting to reflect a series of chat-room conversations from the hard drive of a police computer and a compact disc containing an electronic version of files from that hard drive, Rivas asserted a right to verify the accuracy and completeness of the discovery

with which he had been provided by obtaining a mirror image of the computer hard drive.

{¶ 20} However, Rivas failed to provide any evidence to support his allegation that what had been provided to him during the course of discovery lacked accuracy, authenticity, or completeness, and he destroyed or discarded his own computer hard drive, which would have given him the ability to make a prima facie showing that the state had provided false, incomplete, adulterated, or spoliated evidence. Where a party has received discovery pursuant to Crim.R. 16(B)(1)(c), a trial court will not order production of a mirror image of a computer hard drive without a prima face showing that false, incomplete, adulterated, or spoliated evidence has been provided. Here, Rivas submitted a motion to compel discovery that lacked a sufficient evidentiary basis, and he has therefore failed to satisfy his burden of proof.

{¶ 21} Because the state has provided a printed copy of the transcript of the conversations in this instance, and because Rivas has failed to meet his burden of proof to show that the state has provided false, incomplete, adulterated, or spoliated evidence, the state has complied with its obligations pursuant to Crim.R. 16(B)(1)(c), and access to a mirror image of the hard drive of the police computer is not material to the preparation of the defense. We therefore reverse the judgment of the court of appeals.

Judgment reversed.

LUNDBERG STRATTON, O'CONNOR, and LANZINGER, JJ., concur.

MOYER, C.J., and PFEIFER and CUPP, JJ., dissent.

CUPP, J., dissenting.

{¶ 22} Because the majority's holding contrasts with the plain language of Crim.R. 16(B)(1)(c) and because appropriate mechanisms otherwise exist within the Criminal Rules to safeguard from disclosure information not relevant to the defendant's defense, I must respectfully dissent.

{¶ 23} There is no requirement in the discovery provisions of the Criminal Rules that a defendant who wishes to verify the accuracy of the printed version of electronic data stored on a state's computer hard drive must first make a prima facie showing that the state provided false, incomplete, adulterated, or spoliated evidence. Although defendant's basis for asserting a discrepancy between the printed version of the data and the version that resides on the computer hard drive may seem unusual, there is no justification for creating, as the majority opinion does, a permanent judicial gloss over the plain language of the discovery rules to short-circuit defendant's discovery request. Moreover, imposing such a standard ignores the plain language of the rule by imposing obligations on the defendant beyond the rule's "materiality" standard.

{¶ 24} The only limitations in Crim.R. 16(B)(1)(c) are that evidentiary materials must be in the state's possession and must be (1) material to the preparation of defense, (2) intended for use by the prosecuting attorney as evidence at the trial, or (3) obtained from

or owned by the defendant.[1] In this case, the computer hard drive was in the state's possession and was material to defendant's defense theory. Further, the prosecutor intended to use, in printed form, the data contained on the hard drive as part of the state's evidence. Crim.R. 16(B)(1)(c). In contrast to the majority's holding, nothing in the text of Crim.R. 16(B)(1)(c) requires a defendant to demonstrate any threshold indicia of unreliability of the challenged evidence in the state's custody. The trial court should have ordered the state to produce the hard drive for the defendant's inspection or copying. As the appellate court recognized, "forcing a litigant to rely upon an adverse party's representation that a transcript" is accurate without allowing any verification of that accuracy is inconsistent with general notions of a fair trial. *State v. Rivas*, 172 Ohio App.3d 473, 2007-Ohio-3593, 875 N.E.2d 655, ¶ 2.

{¶ 25} Notwithstanding, the state has legitimate reason to prevent defendant's unrestricted access to the data on the computer hard drive. According to the state, the computer hard drive that contains the data sought by defendant also contains data that pertain to

---

[1] The initial obligation to demonstrate that the requested disclosure of a document or tangible object is material to the preparation of a defense has always been placed on the defendant. See, e.g., Crim.R. 16(B)(1)(c) ("Upon motion of the defendant [a court shall permit discovery of documents and tangible items] which are material to the preparation of his defense * * * "); *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 435, 639 N.E.2d 83 (quoting the rule); *United States v. Rhoads* (C.A.8, 1980), 617 F.2d 1313, 1319 (concluding that a defendant failed to demonstrate the manner in which the desired materials were "material to the preparation" of the defense under former Fed.R.Crim.P. 16(a)(1)(C)).

investigations not related to defendant. Simply because a defendant is allowed to inspect and copy the evidence under Crim.R. 16 does not mean that his access to the evidence must be free of all restrictions. Therefore, the defendant's access should be limited to prevent the disclosure of information pertaining to these other matters.

{¶ 26} The methods by which a court may limit a defendant's access to only the information needed for his defense are delineated in Crim.R. 16(E)(1) and (2): the use of protective orders and restrictions on the time, place, and manner of the inspection and copying of evidence. There has been no showing that the trial court in this instance could not have allowed Rivas access to the state's computer hard drive as required by Crim.R. 16(B)(1)(c) while simultaneously protecting the state's interest in not disclosing information pertaining to other investigations through the use of a protective order under Crim.R. 16(E). Indeed, the trial court's initial discovery order allowing for inspection had, in fact, contained the caveat that computer hardware would be inspected, printed, copied, or photographed only in the presence of and under the control of the Xenia Police Department.

{¶ 27} Although the exact form of protective measure – whether by in camera inspection, examination by a third-party expert, or any other means – is a decision best left to the sound discretion of the trial court examining the evidence and facts before it, the fact remains that such a safeguard exists within Crim.R. 16. Rather than improvising a standard that is unsupported by the plain language of the criminal rule and likely to have unforeseen consequences, we should hold that the safeguards

specifically contemplated by the rule should be used to prevent disclosure of information not relevant to a defendant's defense.

{¶ 28} I must respectfully dissent.

MOYER, C.J., and PFEIFER, J., concur in the foregoing opinion.

Stephen K. Haller, Greene County Prosecuting Attorney, and Elizabeth A. Ellis, Assistant Prosecuting Attorney, for appellant.

Law Office of Marc Mezibov, Marc D. Mezibov, and Stacy A. Hinners, for appellee.

APPENDIX B

THE SUPREME COURT OF OHIO

Case No. 2007-1611

[Filed June 3, 2009]

State of Ohio	)
	)
v.	)
	)
Jose A. Rivas	)
	)

RECONSIDERATION ENTRY

Greene County

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Greene County Court of Appeals; No. 05CA147)

/s/ _____
THOMAS J. MOYER
Chief Justice

APPENDIX C

[Cite as *State v. Rivas*, 172 Ohio App.3d 473, 2007-Ohio-3593.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

Appellate Case No. 05-CA-147
Trial Court Case No. 05-CA-33

The STATE OF OHIO,	)
	)
Appellee,	)
	)
v.	)
	)
RIVAS,	)
	)
Appellant.	)
	)

(Criminal Appeal from Common Pleas Court)

OPINION

Rendered on the 13th day of July, 2007.

Stephen K. Haller, Greene County Prosecuting Attorney, and Elizabeth A. Ellis, Assistant Prosecuting Attorney, for appellee.

Marc D. Mezibov and Stacy A. Hinners, for appellant.

FAIN, Judge.

{¶ 1} Defendant-appellant, Jose Rivas, appeals from his convictions for importuning and attempted unlawful sexual conduct with a minor. The charges arose from Rivas's on-line chats with a Xenia police officer posing as a 14-year-old girl whom Rivas arranged to meet at a hotel for sex. Rivas filed a series of pretrial motions regarding discovery issues, after which the case proceeded to a jury trial. The jury found Rivas guilty as charged, and the trial court sentenced him to six months in prison.

{¶ 2} Rivas challenges the trial court's ruling that he not be allowed to make an electronic copy of the police department's computer hard drive on which the original records of the on-line chats were stored. Rivas also maintains that the transcripts of those chats should not have been admitted into evidence, because they were not properly authenticated. Although allowing Rivas to copy the entire hard drive may have compromised other investigations, as well as the privacy of those involved, we conclude that the trial court did have an obligation to conduct an in camera review to verify the accuracy of the copied records that Rivas received. In our view, forcing a litigant to rely upon an adverse party's representation that a transcript from a hard drive accurately reflects the information stored on the hard drive, when that accuracy could be directly verified, is inconsistent with due process. The judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

I

{¶ 3} In early January 2005, Xenia Police Detective Alonzo Wilson, who works in the Internet Child Protection Unit, entered an America On Line ("AOL") chat room. Within minutes of Alonzo entering the general chat room, and before he had even made any contributions, 36-year-old Rivas contacted Wilson via instant messaging and identified himself as a 19-year-old man. Wilson identified himself as a 14-year-old girl named Molly.

{¶ 4} The conversation quickly became sexual in nature, and Rivas sent a photograph of a young man lying naked on a bed. Much of the chat consisted of Rivas asking Molly about her sexual experience and describing in great detail what sexual acts he wanted to perform on Molly and have performed by Molly on him. Rivas offered Molly $200 and encouraged her to buy a $20 web camera so that she could send him nude photos of herself. Molly did send one photo purporting to be of herself that was actually a photo of another, female detective taken when she was about 14 years old. While the two were making plans to meet for sex, Wilson's computer shut down. By the time he returned to the chat room, Rivas was gone.

{¶ 5} The following day Wilson contacted Rivas through the same chat room. Rivas again offered Wilson $200, and the two arranged to meet for sex at an area hotel later that afternoon. During the course of both conversations, Wilson made several references to being only 14 and not wanting to get pregnant. He also talked of school, homework, and cheerleading, and he told Rivas that he lived with his grandmother.

{¶ 6} Wilson, three other detectives, and a patrol officer set up a surveillance of the hotel. Rivas stopped at a gas station across the street and withdrew $300 from the ATM before checking into the hotel. Rivas paged Wilson with the room number. As the detectives approached the room, Rivas exited. The detectives arrested Rivas, who was carrying $200 in cash, three condoms, and a cell phone.

{¶ 7} Rivas testified in his own defense along with several character witnesses. Rivas disputed the accuracy of more than half of the content of the conversation with Wilson. He denied sending or receiving photos, and he denied claiming to be 19. Moreover, Rivas maintained that there was nothing said that could have led him to believe that he was communicating with a minor. Rivas insisted that he thought he was arranging to meet a 41-year-old woman.

II

{¶ 8} Rivas's First Assignment of Error is as follows:

{¶ 9} "The trial court erred in denying appellant's motion to compel inspection and copying of the computer hard drive."

{¶ 10} In his First Assignment of Error, Rivas argues that the trial court erred in refusing to order the state to allow his expert to make an electronic copy of the police department's computer hard drive. The granting or denial of a motion to compel discovery is reviewed under an abuse-of-discretion standard. The inquiry is whether the trial court's decision is

unreasonable, arbitrary, or unconscionable. *State ex rel. V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198. While we do not hold that the trial court was required to allow the making of the electronic copy of the hard drive, we do conclude that the trial court abused its discretion by refusing to allow any means for Rivas to be assured that the transcripts provided to him by the police, purporting to represent the information stored on the hard drive concerning his conversation with "Molly," were both complete and accurate.

{¶ 11} In preparation for trial, Rivas filed a motion to preserve all electronic evidence in the possession of the Xenia Police Department regarding the charges against him, and he filed a Crim.R. 16 demand for discovery. The trial court granted both motions, stating that Rivas could inspect the evidence in the presence and under the control of the Xenia Police Department. Citing security concerns, the state refused Rivas's expert access to the police department's hard drive and refused to allow Rivas's expert to make a "mirror image" or "electronic snapshot" of the information stored on the hard drive. The state did provide Rivas with a transcript of the chats both on paper and on disk.

{¶ 12} Claiming that the transcripts were incomplete, Rivas filed a motion to compel discovery. The trial court held that absent any allegations or evidence that the transcripts were inaccurate, Crim.R. 16 did not require that the state provide Rivas with a mirror image of the police department's hard drive. Insisting that the transcripts did not contain the complete record of the internet exchanges between

himself and "Molly," Rivas moved for reconsideration, which the trial court overruled.

{¶ 13} Rivas's defense centers on his claim that he believed that he was communicating with a 41-year-old woman rather than a 14-year-old girl. He denies receiving the photo of Molly. Additionally, he disputes more than half of the conversation, denying all references to Molly going to school, doing homework, cheerleading, living with her grandmother, or in any other way revealing that she was a minor. In order to support his claims, Rivas maintains that he needed access to the police department's hard drive because the only way that he could determine that the copies provided by the police were complete and accurate was to compare them to the information stored on the hard drive.

{¶ 14} The state contends that its interest in safeguarding the details of other investigations justified not allowing Rivas to have access to the hard drive. It is undisputed that the hard drive in question contained information regarding three years of investigation of child-exploitation cases, including many ongoing cases.

{¶ 15} Without adequate discovery, a defendant's ability to prepare a defense is compromised. While the state insists that their witnesses verified the accuracy of the copies, a defendant should not be required to take the word of the adverse party – the police in this case – that a transcript of information stored on a hard drive is accurate, especially where that information constitutes the very crime that the defendant is alleged to have committed.

{¶ 16} While we are sympathetic to the state's concerns, and we agree that there is a sufficient justification to disallow Rivas access to all of the information stored on the hard drive, which includes other investigations having nothing to do with his case, we conclude that the trial court overlooked a means of protecting that interest while also protecting Rivas's right to a determination of the accuracy of the transcript provided by the state.

{¶ 17} In camera reviews are used by trial courts in many instances. Here, perhaps with the assistance of an expert of its own choosing, the trial court could have compared the information on the hard drive with the transcripts provided to Rivas by the state. The trial court would then be in a position to determine whether the copies were complete and accurate.

{¶ 18} One important aspect of the right to a fair trial is the right of the accused to confront the evidence against him. This is normally thought of as the right to confront witnesses, enshrined in the Sixth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution. Increasingly, the testimony of witnesses may actually be less important to the outcome of a criminal trial than demonstrative evidence. Examples of this trend include DNA evidence in a criminal case and blood-alcohol tests in prosecutions for driving with a prohibited concentration of alcohol in the blood. Preventing an accused from having a reasonable means of verifying that a transcript, prepared by his adversary, the state, accurately and completely reflects direct evidence, in the state's possession, of the very conversation allegedly constituting the crime with which the accused is charged is, in our view,

inconsistent with the accused's fair-trial right to confront the evidence against him.

{¶ 19} Where there is direct evidence of a conversation allegedly constituting the crime with which a defendant is charged, we hold that the right to a fair trial, embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and in Section 10, Article I of the Ohio Constitution, includes the right of the defendant to some reasonable means of verifying that a purported transcript of the conversation, prepared from the direct evidence by the adverse party, is accurate and complete.

{¶ 20} Rivas's First Assignment of Error is sustained.

III

{¶ 21} Rivas's Second Assignment of Error is as follows:

{¶ 22} "The trial court erred in admitting into evidence at trial the state's unauthenticated paper printouts of electronic data."

{¶ 23} Because we have sustained Rivas's First Assignment of Error, his Second Assignment of Error is rendered moot, and we need not address the merits of this claim

IV

{¶ 24} Rivas's First Assignment of Error having been sustained, the judgment of the trial court is

reversed, and this cause is remanded for further proceedings consistent with this opinion.

Judgment accordingly.

BROGAN and VALEN, JJ., concur.

ANTHONY VALEN, J., retired, of the Twelfth Appellate District, sitting by assignment.

APPENDIX D

IN THE COMMON PLEAS COURT
OF GREENE COUNTY, OHIO
CRIMINAL DIVISION

Case No. 05 CR 33

[Filed February 25, 2005]

STATE OF OHIO,	)
	)
Plaintiff	)
	)
vs.	)
	)
JOSE A. RIVAS,	)
	)
Defendant	)
	)

JUDGE CAMPBELL

DEFENDANT'S SUPPLEMENTAL
MOTION FOR DISCOVERY

Now comes Defendant by his undersigned counsel and hereby moves this Court for an Order permitting discovery as set forth below.

Respectfully submitted,

MILLER, FINNEY, McKEOWN & BAKER

/s/
Christ Theodor, Esq. (#0020042)
Attorney for Defendant Jose A. Rivas
20 King Avenue
P. O. Box 610
Xenia, Ohio 45385-0610
Telephone: (937) 372-8055
Facsimile: (937) 374-4545

MEMORANDUM

On February 9, 2005, Defendant filed a Motion for Discovery pursuant to Rule 16, ORCrP, and a Motion for Preservation Order. Defendant now files this supplemental motion for discovery for certain electronic evidence and data relevant to the reliability, trustworthiness and authenticity of computer e-mail communication alleged to incriminate Defendant.

Pursuant to ORCrP 16, Defendant moves this Court for an order requiring the State of Ohio to make available to Defendant's counsel and retained forensic computer expert, at an agreed-upon time, all electronic evidence relevant to this case, including but not limited to the following:

1. All text files (including word processing documents); and

2. Spreadsheets, e-mail files and information concerning e-mails (including logs of e-mail history and usage, header information and deleted filed); and

3. Internet history files and preferences, graphical image format (GIF) files, databases, calendar and

scheduling information, computer system activity logs, chat logs; and

4. All Encase images made of Xenia Police Department machines/computers at the end of every chat session with Defendant and all backup files containing electronic data.

Virtually all of the evidence alleged to incriminate the Defendant consists of computer printouts of alleged conversations with Defendant. Anything can be printed, but the integrity of the printed document is only as trustworthy, reliable and authentic as the system containing the electronic data. There are numerous and extensive requirements and procedures necessary to adequately preserve electronic data so as to establish its trustworthiness and admissibility as evidence. For that reason, it is imperative that Defendant has access to the above-mentioned information to prepare his defense and adequately confront the evidence and witnesses against him.

THEREFORE; Defendant respectfully requests that the State of Ohio be ordered to produce the requested information at a time and place adequate for review by Defendant's expert.

/s/
Christ Theodor, Esq. (#0020042)
Attorney for Defendant Jose A. Rivas

* * *

[Certificate of Service Omitted in Printing of this Appendix]

APPENDIX E

IN THE COMMON PLEAS COURT
OF GREENE COUNTY, OHIO

Case No. 2005 CR 33

[Filed March 11, 2005]

STATE OF OHIO	)
	)
Plaintiff	)
	)
-vs-	)
	)
JOSE A. RIVAS	)
	)
Defendant	)
	)

JUDGMENT ENTRY

This matter is before the Court upon the Defendant's Rule 16 Demand for Discovery filed February 9, 2005; Defendant's Motion for Preservation Order and Memorandum in support thereof with attachment filed February 9, 2005, and Defendant's Supplemental Motion for Discovery and Memorandum in support thereof filed February 25, 2005. No response has been filed by the State of Ohio within the time allotted by the Rules to any of the motions.

The Motion for Preservation Order is sustained and the Xenia Police Department is ordered to preserve all electronic data contained in its computer systems as relates to the Defendant, Jose A. Rivas, and the charges in question.

Defendant's Rule 16 Demand for Discovery and Supplemental Motion for Discovery are sustained and reciprocal discovery in accordance with Rule 16 is hereby ordered. Any and all computer files or other computer related evidence that is discoverable pursuant to Rule 16 will either be provided to the Defendant or the Defendant will be given the opportunity to review, photograph, copy or print such items, however, original computer files, spreadsheets, documentation, hardware, software or any other related computer items will be inspected and/or printed or copied or photographed only in the presence of and under the control of the Xenia Police Department. Any arrangements to accomplish the carrying out of this Order will be handled by counsel.

SO ORDERED.

/s/ J. Timothy Campbell
J. TIMOTHY CAMPBELL, JUDGE
03-10-05

APPENDIX F

IN THE COMMON PLEAS COURT
OF GREENE COUNTY, OHIO
CRIMINAL DIVISION

Case No. 2005 CR 33

[Filed July 12, 2005]

STATE OF OHIO	)
	)
Plaintiff	)
	)
-vs-	)
	)
JOSE A RIVAS	)
	)
Defendant	)
	)

(JUDGE CAMPBELL)

JUDGMENT

This matter came before the Court upon the Motion to Compel Discovery and the Memorandum in support thereof with attachments filed June 24, 2005 and the State of Ohio's Memorandum in Response to Motion to Compel Discovery filed June 30, 2005.

The Court scheduled and held a hearing on the Motion to Compel on July 7, 2005 and heard testimony

from Mark T. Vassel on behalf of the Defendant. Defendant requested a "mirror image" of the Xenia Police Department's hard drive on their computer for Defendant's forensic computer analysis. The Defendant claims that he needs the "mirror image" in order to ensure that the compact disc provided by the State of Ohio, pursuant to Rule 16 for purposes of discovery, was not compromised in any way. Defendant offers no evidence, testimony or otherwise to indicate that the compact disc information is not authentic and complete and when defense counsel was asked why the content of the compact disc could not be compared against the Defendant's own hard drive to which they would have access, apparently the Defendant destroyed or disposed of his own hard drive.

The Court has reviewed Criminal Rule 16 and finds nothing within that rule that would require the State of Ohio to provide a "mirror image" of its hard drive to the Defendant as a result of criminal discovery in the absence of allegations and some evidence that what has been provided is not accurate.

The Court **OVERRULES** the Defendant's Motion to Compel.

SO ORDERED.

/s/ J. Timothy Campbell
J. TIMOTHY CAMPBELL, JUDGE
07-12-05

* * *

[Service Information Omitted in Printing of this Appendix]

APPENDIX G

IN THE COMMON PLEAS COURT
OF GREENE COUNTY, OHIO
CRIMINAL DIVISION

Case No. 2005 CR 33

[August 16, 2005]

STATE OF OHIO	)
	)
Plaintiff	)
	)
-vs-	)
	)
JOSE A. RIVAS	)
	)
Defendant	)
	)

(JUDGE CAMPBELL)

JUDGMENT

This matter came before the Court for hearing on the Defendant's Motion to Suppress and Amended Motion to Suppress filed by defense counsel.

On July 18, 2005, the Defendant also filed a Motion for Reconsideration of the Court's Decision denying that a mirror image of the hard drive of the Xenia Police Department's computer be provided to the

Defendant. The Court **OVERRULES** the Motion for Reconsideration.

Regarding the Motion to Suppress, the Court heard testimony from Mark Vassel a patrolman with the Olmstead Township Police Department who handled computer sex crime investigations. The Court also heard testimony hm Det. Alonzo Wilson of the Xenia Police Department and the Court admitted into evidence Defendant's Exhibits A, B, and C and State's Exhibit 1.

The issue in this case revolves around the Defendant's contention that he should be provided with a mirror image of the Xenia Police Department's hard drive from the computer utilized to generate the chat log which forms the basis of the charges against the Defendant.

Defendant's witness, Mark Vassel, maintains that the integrity of the evidence is compromised as a result of continuous booting of the computer and other uses of the hard drive not necessarily related to this case and that the only way to verify the accuracy of the chat log is to provide a mirror image of the police department's hard drive. Mr. Vassel testified that in cases handled by him, his department uses a 6.4 gig hard drive for each case and replaces the hard drive each time they investigate a different case.

Det. Wilson testified that the chat log in question, identified as State's Exhibit 1, involved conversations on January 3, 2005 and January 4, 2005 and that the chat log was printed directly from the police department's hard drive on January 4, 2005. Mr. Vassel indicated that he had no reason to believe that

State's Exhibit 1 is not accurate other than the fact that he feels the hard drive is better evidence than a hard copy printed chat log as evidenced by State's Exhibit 1.

While the Defendant has requested a mirror image of the hard drive, the Defendant has made no claim that State's Exhibit 1 is inaccurate. As mentioned in the Court's previous decision regarding a denial of the mirror image of the hard drive, the Defendant had evidently destroyed or discarded his own hard drive which would have given the Defendant some basis to claim an inaccuracy, if one in fact did exist. It is apparent that the Defendant is looking for something inaccurate but does not how what inaccuracy he is looking for and the Defendant's own witness could not say that State's Exhibit 1, printed out immediately after the conversation, would not be accurate. All of the Defendant's claims regarding rebooting of the computer and other activity after the printout date of January 4, 2005 would not have affected the printout.

The evidence in this case is the chat log between the police officer posing as a minor and the Defendant. There has been no testimony or evidence presented to the Court to indicate that that chat log has been altered or compromised in any way.

Consequently, the Motion to Suppress and the Amended Motion to Suppress filed by the Defendant are **OVERRULED** in their entirety.

Final Pre-Trial is scheduled for **August 22, 2005 at 9:00 A.M.** and **Jury Trial** is scheduled for **August 24, 2005 at 9:00 A.M.**

SO ORDERED.

/s/ J. Timothy Campbell
J. TIMOTHY CAMPBELL, JUDGE
08-16-05

* * *

[Service Information Omitted in Printing of this Appendix]

APPENDIX H

Ohio Rules of Criminal Procedure
RULE 16. Discovery and Inspection

(A) Demand for discovery. Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney.

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect the copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record. Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a

written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) **Disclosure of evidence favorable to defendant.** Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) **In camera inspection of witness' statement.** Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and

participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case or of statements made by witnesses or prospective witnesses to state agents.

(3) Grand jury transcripts. The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) Witness list; no comment. The fact that a witness' name is on a list furnished under subsections

(B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(a) Documents and tangible objects. If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests. If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the

prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) Witness list; no comment. The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose. If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery.

(1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Time, place and manner of discovery and inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions. A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later

as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

[Effective: July 1, 1973.]